Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

NO. 71-1361 MISC.

GEORGE A. SIMMS,

Petitioner,

v.

THE STATE OF WYOMING,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WYOMING

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TO: THE HONORABLE, THE CHIEF JUSTICE
AND ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES

The Respondent, State of Wyoming, respectfully prays that this Court deny the Petition for a Writ of Certiorari filed in the above-captioned case.

STATUTES INVOLVED

Wyoming Statutes, 1957, Vol. 1, p. 127, Cum. Sup., Section 1-77 Qualifications of juror. --A person is competent to act as a juror if he or she be:

1. A citizen of the United States, of the age of twenty-one (21) and not more than seventy-two (72) years, who shall have been a resident of the state one year and the county ninety (90) days before being selected and returned.

2. In possession of his or her natural faculties and of ordinary intelligence and not decrepit.

3. Possessed of sufficient knowledge of the English language.

4. Assesed on the last assessment roll of the county.

Wyoming Statutes, 1957, Vol. 2, p. 133, Cum. Sup., Section 1-142, Husband and wife as witnesses in civil and criminal cases. --In no case shall the husband or wife be a witness against the other, except in criminal proceedings for a crime committed by one against the other, or in a civil action or proceeding by one against the other, or an action brought by the husband for criminal conversation with or seduction of his wife, or in an action brought by either husband or wife for the alienation of the other's affections; but they may in all civil and criminal cases be witnesses for each other the same as though the marital relation did not exist.

Wyoming Statutes, 1957, Vol. 9, p. 218, Section 39-87, Assessment rolls and tax lists to be furnished assessors; includable items generally. --On the last day of January in each year, the board of county commissioners shall furnish each assessor with suitable assessment rolls and schedules properly ruled and headed, in which to enter the following items:

First --The name of the individual, corporation, company, society, partnership, or firm, to whom any property shall be taxable;

Second--His or their lands by township, range, section or part of a section and where such part is not a legal division or subdivision some other description sufficient to identify it, and his or their town lots or parts of lots, naming the town in which they are situated, and their proper description by number and block or otherwise, according to the system of numbering in the town;

Third--His or their personal property by the following particulars: Amount of capital employed in manufactures; number and value of horses; number and value of mules and asses; number and value of neat cattle; number and value of sheep and goats; number and value of swine; number and value of carriages and vehicles of every description; amount of all personal or other property not herein enumerated; other property not enumerated belonging to any corporation or company, whether incorporated in this state or not; amount of clocks, watches, jewelry, gold and silver plate; number and value of musical instruments; amount of taxable household furniture; amount of farming utensils and mechanics' tools, shares of stock in any bank, loan or investment company, incorporated under the laws of the United States of America or the State of Wyoming, doing business in this state; amount of all other property not enumerated; the number of polls; and a column for remarks.

STATEMENT OF THE CASE

The Respondent, State of Wyoming, accepts the Statement of the Case as set forth by the Wyoming Supreme Court which was adopted by Petitioner and appears on pages 5 through 8 of Petitioner's Brief.

REASONS FOR DENYING THE WRIT

Challenge to the Array

While this Court has not had occasion to review the method of jury selection used in Wyoming and by several other jurisdictions, the decision of the Wyoming Supreme Court is not in conflict with the latest decisions of this Court on this issue, and the identical issue was presented for this Court's determination in another case from Natrona County, Wyoming, October Term, 1971, in the Petition for Writ of Certiorari in re: *William A. E. Lofton, Petitioner, v. The State of Wyoming, Respondent, No. 71-6070,* which Petition was denied by this Court on May 22, 1972.

The Petitioner in the *Lofton* case, like the Petitioner herein, overlooks the provisions of Section 1-77, Wyoming Statutes, 1957 (1971 Cum. Supp.) set out in this Brief under the heading, STATUTES INVOLVED, which contains as one of the qualifications of a juror that he be "assessed on the last assessment roll of the county." This provision is controlling since it was the latest enactment of the Legislature of Wyoming. The two provisions quoted by Petitioner in his Brief, Sections 18-105 and 18-107, Wyoming Statutes, 1957, were originally enacted in 1888, while Section 1-77, *supra,* was enacted in 1890. "All of the statutes relating to jurors must be considered *in pari materia.*" *Lofton v. State,* 489 P.2d 1169 (Wyo. 1971).

Petitioner also overlooks the provisions of Section 39-87, Wyoming Statutes, 1957, which requires that the assessors list the owners of all *real and personal* property on the assessment rolls. The Trial Court below specifically found that the assessor and the clerk followed the statutory guidelines in compiling and selecting the jury (1403).

As pointed out on page 7 of Petitioner's Brief as support for his challenge to the jury array, Petitioner's counsel pre-

sented his own affidavits (149 and 152) to the effect that he had studied the procedure for compiling the lists from which jurors are chosen and discovered that only the names of persons owning real property appeared thereon, (150) and that the list of trial jurors from which the existing and previous jury panels were chosen did not include any persons within the county who do not appear on the tax assessment rolls as owners of property, real or personal (152).

The reason, of course, that no persons who do not own real or personal property do not appear on the jury panels in Wyoming is the provisions of the Wyoming Statutes quoted earlier under the heading, STATUTES INVOLVED, which provisions require that the assessors list the owners of all real and personal property on the assessment rolls, and that a person is competent to act as a juror only if he or she be assessed on the last assessment roll of the county, and for the further reason that the Wyoming Supreme Court has interpreted the statutes of the State of Wyoming (as it is entitled to do, *see, Williams v. Oklahoma,* 1959, 358 U.S. 576, 583; *Garner v. Louisiana,* 1961, 368 U.S. 157, 166) as requiring the jury commissioners to make a jury list from the assessment rolls, *State v. Bollen,* 10 Wyo. 439, 70P. 1 (1902); and *State v. Radon,* 45 Wyo. 383, 19 P.2d 177 (1932).

The real issue presented by the Petitioner is not the exclusion of non-real property owners from the jury, it is the absence of Negroes from the jury panel. But nowhere in the Record is it shown that Negroes or personal property owners in Natrona County are systematically excluded from juries. This must be shown in order to make out a *prima facie* case of discrimination. There was no proof that members of the Negro race do not appear on the tax rolls. As a matter of fact, when jury lists are drawn, it is not known what race or color the prospective juror is. This was substantiated by the affidavit of Earl Osborn, County Assessor, in his affidavit appearing on page 154 of the Record.

In addition, the authority cited by Petitioner that no member of Petitioner's race have been drawn for jury service for several years does not make out a *prima facie* case of discrimination. That argument in this case is inefficable since the testimony of the Petitioner's own witness was that three or four Negroes have served on juries in the last few years. (The Respondent does not concede that there have been only four Negroes drawn for jury duty over the last thirteen years, as the only evidence of this fact was the statement of the court bailiff who indicated that he *only remembered* three or four Negroes serving during the last thirteen years.)

As stated by the Wyoming Supreme Court in its opinion (*Simms v. State*, 492 P.2d 516, 520 (Wyo. 1972), also appearing as Appendix "A" of Petitioner's Brief at page 32),

> "... the unfortunate method by which the attack on the jury array was launched, i.e., without any specific information as to numbers or persons eligible for jury service and solely on approximations, opinions, and recollections. Conjecture can have no part in such challenges and specific evidence, here lacking, is essential to establish a prima facie case of exclusion."

As pointed out by Petitioner in his Brief on page 6, as support for his challenge to the jury array, he also presented an affidavit of "one Devereaux, a black electrical engineer and Housing Chairman for the Wyoming-Colorado Conference of the N.A.A.C.P., as to affiant's estimate of the population of the county, ..." which affidavit states that the Negro population of Natrona County, Wyoming, at the time of trial was in excess of 2500 persons (148). According to the 1970 Federal Census, however, there are only 410 Negroes in Natrona County, Wyoming. *1970 Census of Population, General Population Characteristics, Wyoming, U.S. Department of Commerce, Bureau of the Census, Table 34.* The 1960 census for the State of

Wyoming shows that in Natrona County there were 483 Negroes. *1960 Census of Population, Volume 1, Characteristics of the Population, Part 52, Wyoming, United States Department of Commerce, Bureau of the Census, Table 25.*

This shows a reduction in the percentage of Negroes in Natrona County, Wyoming, over the last ten years. The small number of Negroes in Natrona County and in the entire State make it quite possible that the selection of 150 names drawn from the jury lists would not include any member of the Negro race thereon. The evidence presented by the Petitioner does not make out a *prima facie* case of discrimination. In order to show such discrimination, actual figures must be used together with a showing of an artificially limited selection of jurors based upon a systematic and intentional exclusion of a particular group.

Additionally, it is not constitutionally required that a jury be a perfect mirror of the community, nor is a defendant in a criminal case constitutionally entitled to a proportionate number of his race on the jury. As this Court stated in *Swain v. Alabama*, 1965, 380 U. S. 202:

> "...a defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him ...."

and

> "Neither the jury roll nor the venire need be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group.... We cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in a community is under-represented...."

This Court went on to say at page 209 of the United States Reporter that:

> "There is no evidence that the commissioners applied different standards of qualifications to the Negro community than they did to the white community. Nor was there any meaningful attempt to demonstrate that the same proportion of Negroes qualified under the standards being administered by the commissioners. It is not clear from the record that the commissioners even knew how many Negroes were in their respective areas, or on the jury roll or on the venires drawn from the jury box. The overall percentage disparity has been small, and reflects no studied attempt to include or exclude a specified number of Negroes. Undoubtedly the selection of propective jurors was somewhat haphazard and little effort was made to ensure that all groups in the community were fully represented. But an imperfect system is not equivalent to purposeful discrimination based on race. We do not think that the burden of proof was carried by petitioner in this case."

It is the position of the Respondent that the *Swain* case is directly applicable to the case at bar. The burden of proof was not carried by the Petitioner below as pointed out in the Wyoming Supreme Court's opinion quoted above.

The case of *Turner v. Fouche,* 1970, 396 U. S. 346, cited by Petitioner as authority for a *prima facie* case of discrimination in this case is distinguishable from the facts of the case at bar. In *Turner,* there was evidence that the population of the county was sixty percent Negro and that a very disproportionate number of Negroes had been selected for jury duty by

reason of their having been disqualified because they were "unintelligent" or not "upright citizens." In *Turner,* of the 178 persons disqualified for this reason, 171 were Negroes.

In the case at bar, however, the Petitioner has alleged that there are 2500 Negroes in Natrona County, which would be less than five percent of the population of the county. This, however, is in error since the Negro population of Natrona County, Wyoming, is 410, which is .008 percent of the county, and there was no evidence presented that any Negro was excluded from the jury list as unqualified. Nor was there any showing other than the self-serving affidavits of Petitioner's own counsel that only persons owning real property appeared on the jury lists. The Petitioner must make a showing of discrimination or prejudice in the manner in which the jury was selected. The mere fact that the venire does not represent a cross-section of the community is not sufficient nor is it accurate.

This Court in *Fay v. New York,* 1947, 332 U. S. 261, at 284, stated:

> "It is fundamental in questioning the composition of a jury that a mere showing that a class was not represented in a particular jury is not enough; there must be a clear showing that its absense was caused by discrimination, ..."

This was also the Court's holding in *Hoyt v. Florida,* 1961, 368 U.S. 57, where this Court held:

> "In the administration of the jury laws proportional class representation is not a constitutionally required factor."

The Respondent submits that the Petitioner has not made a *prima facie* showing of discrimination. As noted by this Court

in *Thiel v. Southern Pacific Co.*, 1946, 328 U.S. 217, discrimination requires the additional showing of a "systematic and intentional exclusion" of a particular group.

The State of Wyoming has not "since the beginning of its history" excluded Negroes from serving on juries. No evidence of this allegation was presented at the hearing on the challenge to the jury array as the Wyoming Supreme Court pointed out, nor was there evidence that Negroes in Natrona County, Wyoming, do not own real property, or that Negroes do not appear on the tax assessment rolls of Natrona County, Wyoming.

The decision of the Wyoming Supreme Court below in no manner conflicts with the decisions of this Court, it was decided correctly, and this issue here presented should not be passed upon by this Court.

WIFE'S TESTIMONY

It is true that this Court has not had occasion to specifically review the question presented here as to the wife's testimony. This Court has, however, reviewed the traditional exception to the right of confrontation and has not seen fit to reverse that rule where the witness is unavailable at the time of trial. As to whether a wife is unavailable by reason of the claimed privilege not to allow one spouse to testify against the other, all courts other than the jurisdiction of Texas are in accord.

The statutory provision pertaining to this issue is set out before under the heading, STATUTES INVOLVED, and is Section 1-142, Wyoming Statutes, 1957. The right not to allow a spouse to testify against a defendant at trial is a privilege and one which may be waived. *Peek v. United States*, 321 F.2d 934 (9th Cir. 1963), *cert. den.* 376 U.S. 954.

In this case, the Petitioner waived the right not to allow his wife's testimony at the trial as found by the Wyoming Supreme

Court in its decision *Simms v. State,* 492 P.2d 519 (Wyo. 1972), at page 521 of the Pacific Reporter where the Court stated:

> "Defense counsel's concluding statement in the conference with the court, notwithstanding his speaking earlier of 'being forced to elect,' clearly and positively waived defendant's right not to have his wife testify against him . . . Having chosen to have his wife testify as a witness, defendant is in no position to argue about his 'forced' election, . . ."

The Petitioner could have claimed the privilege thus allowing the transcript of his wife's testimony taken at the preliminary hearing when she was not his wife to be read into evidence and then have claimed error on that ground. This, he did not do.

It is a simple matter that since the witness, Jean Simms, was not married to the Petitioner at the time of her testimony at the preliminary hearing (wherein she had appeared voluntarily and was represented by counsel who had cross-examined, as was the Petitioner) such testimony could be taken, and it could have been used at the trial in the event she was unable, refused, or was barred from testifying. She was not barred, nor unavailable since the Petitioner waived that disability as he had a right to do, and it was not necessary to use the transcript of testimony at the trial nor was it introduced against the Petitioner.

This Court as stated above has reviewed the exception to the right of confrontation. In the case of *Barber v. Page,* 1968, 390 U.S. 719, this Court said:

> "It is true that there has traditionally been an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant which was subject to cross-examination by that

> defendant . . . This exception has been explained as arising from necessity and has been justified on the ground that the right of cross-examination initially afforded provides substantial compliance with the purposes behind the confrontation requirement."

The case, however, was reversed for the reason that the witness was found to be not unavailable since he was incarcerated in a Federal prison and no attempt was made by the prosecution to obtain his presence for trial.

In *California v. Green,* 1970, 399 U.S. 149, this Court stated:

> "This court long ago held that admitting the prior testimony of an unavailable witness does not violate the confrontation clause.
>
> . . .
>
> "The right of cross-examination then afforded [at the preliminary hearing] provides substantial compliance with the purposes behind the confrontation requirement, as long as the declarant's inability to give live testimony is in no way the fault of the State."

Had the Petitioner herein claimed the privilege granted him by Section 1-142 of the Wyoming Statute (Section 1-142, Wyoming Statutes, 1957), Jean Simms who was then his wife, would have been unavailable by the Petitioner's own actions. No violation of the due process clauses of the Fifth and Fourteenth Amendments is shown, nor is there a violation of Petitioner's rights under the Sixth Amendment.

McCormick on Evidence, Section 234, at page 495 states that:

"If the witness was competent at the time the former testimony was taken, but later becomes incompetent, as by . . . the privilege of one spouse not to testify against the other, the witness is properly regarded as unavailable."

Several State Supreme Courts have followed the rule and have declared the spouse to be unavailable where the claim of privilege has been invoked.

In *McCoy v. State,* 129 So. 21 (Ala. 1930), a case cited to the trial court, and one which is always cited for this particular rule, the wife of the Defendant was called as a witness at her husband's preliminary hearing and was not informed of the privilege not to testify. She voluntarily testified at that time, and later at the trial, she claimed the privilege and refused to testify. The Appellate Court noted that the husband and wife were bound by her testimony at the preliminary hearing where the opportunity of objection and cross-examination existed. The Court then held that it was not error to allow the magistrate to read into evidence the testimony of the wife taken at the preliminary hearing.

In the case of *State v. Stewart,* 116 P. 489, 493 (Kan. 1911), the witness had testified at the preliminary hearing and was present at the trial, but claimed the statutory privilege and declined to testify against his wife. The Court held that he had appeared voluntarily and testified at the preliminary examination in the presence of his wife, who was given full opportunity to cross-examine and that he was a competent witness. That his refusal to testify at the trial made the information which he had formerly given inaccessible to the plaintiff as if he had been dead or out of the jurisdiction. And, that if a witness cannot prevent the use of his testimony by stepping outside the jurisdiction of the Court, he cannot defeat the use of the testimony by claiming his statutory privilege.

Likewise in *Langham v. State*, 68 So. 504 (Ala. 1916), a case very similar to the case at bar, the witness voluntarily testified against the Defendant at the preliminary hearing, and then later married the Defendant and claimed the privilege. The Appellate Court pointed out the reason for the rule permitting secondary evidence of such testimony was that personal attendance of such a witness was unattainable through no fault or voluntary act of the party proposing the use of the former testimony, thus making it an act of injustice not to receive it. But, the Court held that the reason for the rule did not exist in this case since the incompetency of the witness was occasioned by the voluntary act of the Defendant in making her his wife.

Again, in *State v. Woods*, 278 P. 248 (Kan. 1938), the witness (prosecutrix) testified against the Defendant at the preliminary hearing for the crime of statutory rape. However, before trial, the Defendant married the prosecutrix. At that time, the applicable Kansas statute read:

> "No person on trial or examination, nor wife or husband of such person, shall be required to testify except as a witness on behalf of the person on trial or examination."

In an effort to exculpate the Defendant, the prosecutrix took the stand and waived the privilege. The Court held:

> "Moreover, in this case, it would have been of no consequence to the state if the prosecuting witness had claimed her privilege not to testify against defendant. Her testimony given at the preliminary examination was available, and could have been read to the jury. *State v. Stewart*, 85 Kan. 404, . . . 116 P. 489. *See also, State v. Taylor*, . . . 37 P. 1053; *State v. Bell*, . . . 250 P. 281."

Wigmore states the rule in the following manner:

> "A disqualification by a subsequently-acquired *interest*, or the exercise of a *privilege*, makes the witnesses present testimony unavailable, and hence should suffice to allow resort to his disposition or former testimony."

5 Wigmore, Evidence, Section 1409, pp. 163.

The subject is also treated in the Annotation appearing in 45 A.L.R.2d 1354.

These cases cited above are in line with the general rule which allows introduction of testimony given by a witness in a prior proceeding through use of properly authenticated notes of a court stenographer when the witness is unavailable because of privilege. *See, Mason v. United States*, 408 F.2d 903 (10th Cir. 1969), *cert. den.*, 400 U.S. 993 (1971); *United States v. Allen*, 409 F.2d 611 (10th Cir. 1969); *United States v. Mobley*, 421 F.2d 345 (5th Cir. 1970); *Johnson v. People*, 384 P.2d 454 (Colo. 1963); *State v. Solomon*, 487 P.2d 643 (Wash.Ct.App. 1971).

The one case relied upon by the Petitioner in his Brief, *Cole v. State*, 243 SW 1100 (Texas 1922) as found by the Wyoming Supreme Court, in its opinion at page 521:

> "... is not in point since it is noted that there the matter before the court was whether or not it was error for the district attorney to have *testified* that statements of a woman not, present at the scene of the homicide, and at the time of the trial the wife of defendant, had previously been 'used against' the defendant." *State v. Simms*, 492 P.2d 516 (Wyo. 1972).

The law on this issue appears to be well settled. The testimony given by a witness in a prior proceeding may be introduced in evidence when the witness is unavailable at the trial. This unavailability may be by reason of death, sickness, beyond the jurisdiction of the court, or privilege. And, the privilege of one spouse not to testify against the other makes the witnes unavailable. Research discloses that there is only one case in conflict and that is the case relied upon by the Petitioner. The decision of the Wyoming Supreme Court is in no way in conflict with the rules cited above. The Petitioner effectively waived his right not to have his wife testify against him at the trial, and the question is not of sufficient importance to require consideration by this Court.

CONCLUSION

Since the Petitioner has not made a *prima facie* showing of discrimination against members of the Negro race or against personal property owners in Natrona County, Wyoming, in the method of jury selection, and is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him, and waived his right not to have his wife testify against him, the Petitioner's writ does not warrant further consideration by this Court. If, however, this Court feels that the allegations set forth within the Petition are of a meritorious nature and deserving of further consideration, the Respondent respectfully requests that it be allowed to fully brief and argue such issues for this Court.

Respectfully submitted,

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CERTIFICATE OF MAILING

I, Clarence A. Brimmer, Attorney General for the State of Wyoming, do hereby certify that I served the within and foregoing BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI upon the attorneys for the Appellant by placing a copy thereof in the United States mails, postage prepaid, properly addressed to Mr. Thos. J. Fagan, Fagan and Fagan, V.F.W. Building, 142 North Center, Casper, Wyoming 82601, a copy thereof addressed to John Burk, County and Prosecuting Attorney, Natrona County, Wyoming, City-County Building, Casper, Wyoming, and a copy thereof addressed to G. J. Cardine (former Natrona County, Wyoming, County and Prosecuting Attorney), 410 Con Roy Building, Casper, Wyoming, on the 3rd day of June, 1972.

/s/ Clarence A. Brimmer